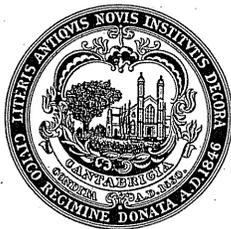


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CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
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November 21, 2011

Robert W. Healy
City Manager
City Hall
Cambridge, MA 02139

**Re: Policy Order No.: O-1 of 10/31/11
Awaiting Report No.: 11-65 re: report on the possibility of emulating the San
Francisco Yellow Pages ban in Cambridge**

Dear Mr. Healy:

In response to City Council Policy Order O-1 of October 31, 2001 in which it came to the Council's attention that Cambridge residents can opt out of the next year's phone books if they choose by visiting www.catalogchoice.org; that the City is working with MassDEP, the Product Stewardship Institute and Catalog Choice to reduce unwanted phonebooks and junk mail; and that the request to opt out must have been received by November 1, 2011; and that that the Council went on record encouraging residents who wish to opt out of the phone book to visit [catalogchoice.org](http://www.catalogchoice.org) by November 1, 2011 to opt out, I would add that we are also aware of a website offered by the publishers of the yellow pages <http://www.yellowpagesoptout.com/> which allows residents to notify all of the publishers in a specific postal zip code area to cease delivery of unsolicited phonebooks.

In response to Awaiting Report No.: 11-65, as you may recall, this office previously responded to a City Council Order, (Awaiting Report No.: 11-21) on February 28, 2011 outlining the ongoing litigation involving a legal challenge to the City of Seattle's ordinance providing for an "opt-out" registry for receipt of yellow pages telephone directories (the "Seattle Ordinance"). At that time I recommended that since the City of Seattle's ordinance had been challenged in federal district court that it would be of great assistance to await the outcome of that litigation in order to provide the Council with advice on the efficacy of promulgating a comparable ordinance. In the interim, the City of San Francisco enacted a

measure which provides for an “opt-in” registry. The following is an update on the current status of these enactments and related litigation.

Status of Seattle’s “Opt-Out” Ordinance Litigation

On May 8, 2011, the federal district court denied the yellow pages publisher’s motion for a preliminary injunction seeking to stay the operation of Seattle’s ordinance. The federal district court held that the yellow pages publishers failed to demonstrate a likelihood of success on the merits of the case. The court specifically ruled that

1. the yellow pages are commercial speech;¹
2. Seattle articulated government interests that were substantial, i.e. waste reduction, resident privacy, and cost recovery;
3. the City has shown a “reasonable fit” between the government’s ends and the means chosen to accomplish those ends, i.e. the provision of a “opt-out” registry, a recovery fee, and license requirement for distributors.

Two days later after the federal district court’s decision was rendered, the yellow pages publishers filed an appeal to the federal Ninth Circuit Court of Appeals. On June 28, 2011, the federal district court ruled in favor of the City of Seattle on cross-motions for summary judgment. Subsequently, the yellow pages publishers appealed that decision as well. The Ninth Circuit heard oral argument on the appeal on July 13, 2011 but no ruling has been issued to date.

San Francisco’s “Opt-In” Ordinance

On May 26, 2011, the Mayor of San Francisco signed into law a ban on the unsolicited distribution of yellow pages, i.e. an ordinance creating an “opt-in” registry, to go into effect in May 2012. On June 7, 2011, the Local Search Association, (i.e. the yellow pages publishers) filed a lawsuit in the Northern District of California challenging the San Francisco ordinance. The lawsuit asserts that the “opt-in” registry violates the First Amendment and the Equal Protection Clause of the U.S. Constitution as well as the corresponding California constitutional provisions protecting free speech and ensuring equal protection.

The current litigation involving Seattle ordinance in the Ninth Circuit will not resolve the legal issues that are presented by San Francisco’s “opt-in” ordinance. However, the federal court that decided the constitutional validity of Seattle’s “opt-out” registry, which is in the same federal circuit as San Francisco, favorably distinguished it from the perceived infirmities presented by a comparable “opt-in” provision. There the federal court noted that

¹ The First Amendment affords protection to commercial speech under an intermediate scrutiny standard. Intermediate scrutiny in the context of commercial speech as announced by the United States Supreme Court in the Central Hudson case, requires that, (1) the speech concerns lawful activity that is not misleading; (2) the government interest is substantial; (3) the regulation directly advances that interest; and (4) the regulation is not more extensive than necessary. 447 U.S. 557, 566 (1980).

In *Bolger*, the Court rejected the government's interest in creating an opt-in regulation in order to shield residents from receiving in the mail potentially offensive and intrusive advertisements for contraceptives, because the City's stated interest and the regulation were paternalistic. 463 U.S. at 71-74. Here, by contrast, the City's interest in privacy is substantial and does not suffer from the type of paternalism that the Supreme Court rejected in *Bolger*. Unlike the opt-in regulation in *Bolger*, the Ordinance creates an opt-out system, where the resident, and not the City, makes the choice to not receive the speech or directories at issue. *Anderson v. Treadwell*, 294 F.3d 453, 464 (2d Cir. 2002) (unlike some commercial restrictions where an interest is vulnerable because of paternalism, a resident opt-out ordinance "entirely avoids such concerns because it applies only where homeowners elect to seek its protection").

Conclusion

Even though the litigation surrounding the Seattle "opt-out" ordinance has concluded at the federal district court level, the litigation is likely to continue at least through the federal appeals court. Litigation regarding the enactment of the "opt-in" ordinance in San Francisco has only been instituted in May 2011. Based on the ruling of the federal court deciding the Seattle ordinance, it appears that the San Francisco "opt-in" ordinance faces a serious risk of being declared unconstitutional.

I would again recommend that the Council await the outcome of the litigation related to the Seattle and San Francisco Ordinances before promulgating a comparable measure. In the meantime, residents can avail themselves of the above referenced opt-out websites to notify publishers that they do not wish to receive phone books, yellow pages, and other unwanted mail.

Sincerely,



Donald A. Drisdell
City Solicitor

Enclosure